

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 24, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2006AP438-CR

Cir. Ct. No. 2004CM704

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

NICOLE A. FASSBENDER,

DEFENDANT-APPELLANT.

APPEAL from an order of the circuit court for Dodge County:
DANIEL W. KLOSSNER, Judge. *Affirmed.*

¶1 VERGERONT, J.¹ Nicole Fassbender appeals the circuit court's order that she pay \$6,400.54 in restitution to the victim of the crime of disorderly conduct to which she pleaded guilty. Fassbender contends that the circuit court

¹ This appeal is decided by one judge pursuant to WIS. STAT. § 752.31(2)(e) (2003-04). All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

did not act in accordance with WIS. STAT. § 973.20² in a number of ways and we therefore should reverse and remand for further proceedings on restitution. For the reasons we explain below, we reject each of Fassbender's contentions and we affirm the order for restitution.

BACKGROUND

¶2 This action began with a complaint charging Fassbender with one count of misdemeanor battery contrary to WIS. STAT. §§ 940.19(1) and 939.51(3)(a), and one count of disorderly conduct contrary to WIS. STAT. §§ 947.01 and 939.51(3)(b). The charges arose out of an incident that occurred at

² WISCONSIN STAT. § 973.20 provides in relevant part:

....

(1r) When imposing sentence or ordering probation for any crime, other than a crime involving conduct that constitutes domestic abuse under s. 813.12 (1) (am) or 968.075 (1) (a), for which the defendant was convicted, the court, in addition to any other penalty authorized by law, shall order the defendant to make full or partial restitution under this section to any victim of a crime considered at sentencing... unless the court finds substantial reason not to do so and states the reason on the record....

(3) If a crime considered at sentencing resulted in bodily injury, the restitution order may require that the defendant do one or more of the following:

(a) Pay an amount equal to the cost of necessary medical and related professional services and devices relating to physical, psychiatric and psychological care and treatment.

(b) Pay an amount equal to the cost of necessary physical and occupational therapy and rehabilitation.

(c) Reimburse the injured person for income lost as a result of a crime considered at sentencing.

Fassbender's child's school on September 1, 2004. According to the complaint, Fassbender was attempting to remove her child from the school when a woman, Kelly Abfall,³ bent down as if to hug the child. Fassbender then punched Abfall in the eye, grabbed her by the hair, held her up against the wall screaming at her, and kicked her stomach.

¶3 After Fassbender entered a plea of no-contest to the disorderly conduct charge, the court scheduled a hearing on restitution for July 8, 2005. Because Fassbender's counsel moved to withdraw and the court appointed new counsel, the restitution hearing was continued until November 3, 2005.

¶4 At the restitution hearing Abfall testified as follows concerning her injuries. She had had a complete hysterectomy two weeks prior to the incident, and as a result of Fassbender's kicking her in the stomach, some stitches from that surgery ripped open. She had to go to a hospital emergency room to have those repaired; that was not successful so she had to return to have that done again. She then had a number of infections relating to this injury. Fassbender also ripped hair out of Abfall's head and punched her in the left eye, causing vision problems. In addition, the medical reports she submitted from the emergency room visit on September 1, 2004, and September 25, 2005, also noted pain on both sides of her neck and to the right ribs.

¶5 Abfall submitted a restitution summary for a total of \$11,624.09, with the amounts of various items specified. She explained the items and amounts as follows. The \$277.84 in medical expenses were expenses she incurred as a

³ At the time of the incident the victim's name was Kelly Sproule.

result of the injuries that were not covered by her insurance. She was requesting reimbursement for the \$1000 deductible she paid for the year 2005 because 98% of her medical appointments from January 1 to June 1, 2005 were related to this incident and she would not have had to pay the \$1000 deductible otherwise. She was requesting reimbursement for the \$500 medication co-pay for 2005 because most of the medications were for the infections from these injuries. She was requesting \$400 to replace her glasses, which were prescription sunglasses: she was wearing them on her head, and they flew off and broke when Fassbender hit her and threw her against a wall.

¶6 The bulk of Abfall's restitution request was for lost wages: \$5,531.25 for 2004 and \$3,915 for 2005. To support these amounts, Abfall presented two letters from her employer. A letter dated February 15, 2005, stated that "Kelly [Abfall] has requested a letter showing which days she missed due to an incident that occurred on September 1, 2004. Her average work week is 55 hours." The letter gave specific dates in September, October, and November 2004 and the hours Abfall took off each day; it also stated that the number of hours worked times her hourly wage equaled \$4,781.25. The second letter dated June 27, 2005, stated that Abfall:

has missed approx. 40 hours of work not included in the 1st letter ... in months of Oct., Nov. & Dec. 2004 at a pay rate of \$18.75 per hour. She has also lost another 174 hours since the beginning of this year at a pay rate of \$22.50 per hour. Approx. 15 days.

Abfall testified that the absences within the first week or two of the incident were because she was either in the hospital or resting because the doctor told her not to go back to work. All the other dates, she testified, were dates that her employer kept track of when she called in.

Like if I called in and said I have got to go to the hospital because of this, he wrote it down. Now if I called in and said, hey, my kids are sick, he didn't include any of those days, or if it was something not pertaining to this, doctors appointment or something else that was going on, he didn't write it down. So these dates are just for doctor appointments and emergency room visits and things like that pertaining to the September 1, 2004 incident.

Abfall repeated at a later point in her testimony that all the dates listed "were directly related to this incident, doctors follow-up appointments," and she repeated that her way of keeping track of what days she had appointments for this incident was by reporting it to her employer and having him write it down. She explained that the number of appointments were in part related to the infections that she got as a result of the injury following the hysterectomy.

¶7 When asked on cross-examination whether she had the doctor's reports to verify her medical problems, Abfall stated that she had given everything to another attorney in the district attorney's office. The assistant district attorney present at the hearing explained to the court that she had asked another assistant district attorney to look for the documents, but he did not have them. The court stated that it wanted to see the medical reports in order to decide whether Abfall was entitled to the restitution she was requesting. Rather than inquiring further into why the district attorney's office could not locate the medical reports that Abfall said she dropped off there, the court established a procedure for Abfall to provide another set of copies to the assistant district attorney present at the hearing and to Fassbender's counsel. The court stated that it wanted the medical reports within thirty days and then it would schedule a hearing.

¶8 The court scheduled a continuation of the restitution hearing for January 26, 2006. The day before the hearing, Fassbender filed a motion asking the court to reconsider its decision to hold a continued restitution hearing rather

than deciding the case based on what was submitted at the November 3 hearing; in the alternative, the motion requested that the court exclude from the January 26 hearing all medical reports that had not been provided Fassbender's counsel by December 1, 2005, which, the motion asserted, was the date on which all new documentation had to be submitted to him and to the court.

¶9 At the hearing the next day, the court first took up Fassbender's motion. Fassbender's counsel stated that he had received five or six pages of documents from Abfall through the district attorney's office prior to December 1, and then received additional documents on January 2 and on the proceeding day, January 25. He stated that he had not had time to go through the documents he received on January 25 and his client had not had an opportunity to see them.

¶10 The assistant district attorney responded that the documents forwarded to Fassbender's counsel the preceding day had already been provided him; she had simply numbered them and included her own cover sheet categorizing them. She explained that on November 22 she had sent a letter to the court with a copy to Fassbender's counsel with some of the documents, stating that she had received other documents from Abfall, but was not sure which ones were relevant; she would send others after she met with Abfall.⁴ She then met with Abfall during the second week of December, and on January 2 she sent to Fassbender the additional documents that were relevant. She acknowledged that these documents were sent after the thirty-day time period, but she had thought

⁴ This letter is in the record, and the assistant district attorney's description of the letter is accurate.

that her November 22 letter to the court, with a copy to Fassbender's counsel, was sufficient to explain why that would occur.

¶11 After hearing from the attorneys, the court denied Fassbender's motion. The court stated that it had discretion to continue the restitution hearing in order to provide an opportunity to obtain additional medical evidence and other evidence. The court explained that in its view a continuance was necessary in order to fairly determine the amount of restitution to which Abfall was entitled.

¶12 The hearing on restitution continued with both attorneys examining Abfall on the medical and billing records submitted since the November hearing. The court found that the uncovered medical expenses of \$277.84 and an additional \$165.20 were related to the injuries from Fassbender and were appropriate for restitution, as was the \$400 for the glasses. The court decided that Abfall should not be reimbursed for the \$1000 deductible or the \$500 co-pay, apparently because the evidence indicated that Abfall might have incurred some of these costs if the September 1 incident had not occurred, but the evidence was insufficient to prove what portion.

¶13 The court found it was not clear that the medical treatment for kidney stones was related to the injuries Abfall received from Fassbender and, therefore, any lost wages related to that would have to be subtracted. Except for that subtraction, the court found, Abfall had proved that she lost wages in the amount she requested because of injuries related to the incident. The court gave the attorneys the opportunity to confer in order to come up with figures for the lost wages based on this ruling. The attorneys agreed on a figure for 2005—\$1,732.50—but they could not agree on a figure for 2004. They did agree there was one day in 2004 that should be subtracted because Abfall was absent for a

doctor's visit for treatment of the kidney stones. However, there were a number of other days when she was absent from work because she was not feeling well, as opposed to going to a doctor's appointment, and, Fassbender's attorney argued, it was not clear whether she was not feeling well because of the kidney stones or for some other reason. The court considered each of the days for which the parties had a dispute in 2004 and disallowed all but September 2, 6, 8 and 9, the days closest to the incident. The court found the lost wages for 2004 related to the incident were \$3,825.

DISCUSSION

¶14 On appeal, Fassbender contends that the circuit court was not acting in accordance with WIS. STAT. § 973.20 and therefore erred in these ways: (1) it allowed Abfall to submit additional evidence after the November 3, 2005 hearing and based its decision on that evidence; (2) it did not require proof by the greater weight of the evidence; (3) it awarded restitution for injuries and damages that were not supported by the evidence and had no causal nexus to the crime; and (4) it did not consider her (Fassbender's) ability to pay.

¶15 WISCONSIN STAT. § 973.20 reflects a strong public policy that victims should not have to bear the burden of losses if the defendant is capable of making restitution. *State v. Canedy*, 2000 WI App 87, ¶8, 234 Wis. 2d 261, 610 N.W.2d 147. We interpret the statute broadly to allow victims to recover their losses that result from a defendant's criminal conduct. *Id.* A victim seeking restitution must show that a defendant's conduct was a substantial factor in causing the damage for which restitution is sought. *State v. Rouse*, 2002 WI App 107, ¶11, 254 Wis. 2d 761, 647 N.W.2d 286.

¶16 A decision on the amount of restitution to be ordered is committed to the circuit court's discretion, and we affirm if the circuit court applied a correct legal standard, logically interpreted the facts, and used a rational process to reach a reasonable conclusion. *State v. Longmire*, 2004 WI App 90, ¶16, 272 Wis. 2d 759, 681 N.W.2d 534. When we review the factual findings that are part of a discretionary decision, we accept the trial court's findings unless they are clearly erroneous. *State v. Holmgren*, 229 Wis. 2d 358, 366, 599 N.W.2d 876 (Ct. App. 1999). As the fact finder in a restitution hearing, the circuit court is free to accept and reject evidence and to give accepted evidence such weight as it desires. *See State v. Boffer*, 158 Wis. 2d 655, 663, 462 N.W.2d 906 (Ct. App. 1990). However, this court decides de novo whether the circuit court applied a correct construction of the statute. *See Holmgren*, 229 Wis. 2d at 366. Applying these standards, we conclude the circuit court properly exercised its discretion and did not commit any legal or factual errors in determining the amount of restitution.

¶17 First, the circuit court acted in accordance with WIS. STAT. § 973.20 and properly exercised its discretion in allowing Abfall to submit additional evidence after the November 3, 2005 hearing and in considering that evidence in its decision. Generally, courts have the inherent authority to decide whether or not to allow continuances, and the decision is committed to the circuit court's discretion. *See State v. Chvala*, 2003 WI App 257, ¶21, 268 Wis. 2d 451, 673 N.W.2d 401. In restitution hearings, the role of the circuit court is defined by statute:

(d) All parties interested in the matter shall have an opportunity to be heard, personally or through counsel, to present evidence and to cross-examine witnesses called by other parties. The court ... shall conduct the proceeding so as to do substantial justice between the parties according to the rules of substantive law and may waive the rules of practice, procedure, pleading or evidence, except

provisions relating to privileged communications and personal transactions or communication with a decedent or mentally ill person or to admissibility under s. 901.05.

Section 973.20(14)(d).

¶18 Here the court reasonably decided that it needed the medical records and bills to determine what expenses or losses were related to the injuries Abfall received from Fassbender. The court also acted reasonably in concluding that Abfall should not be foreclosed from having those documents considered based on what appeared have been a mix-up or misunderstanding between her and the district attorney's office regarding these records. The court established a reasonably short period of time for her to provide the additional records, and Fassbender and her attorney had the opportunity to review them before the continued hearing. The court also acted reasonably in permitting Abfall to present at the continued hearing documents that were provided to Fassbender's counsel after the thirty-day time period: the assistant district attorney had informed the court and opposing counsel in advance that this would occur, Fassbender's counsel made no objection at that time, and he presented no reason to the court why Fassbender was prejudiced by receiving the documents on January 2 rather than earlier. Fassbender did not dispute before the circuit court, nor does she on appeal, the statement of the assistant district attorney that all the documents she provided Fassbender's counsel on January 25, 2006, had been provided him on January 2 or earlier. In short, the circuit court properly exercised its discretion to make sure that both Abfall and Fassbender had a fair opportunity to present evidence.

¶19 Second, the circuit court did not ignore the requirement in WIS. STAT. § 973.20(14)(a) that "[t]he burden of demonstrating by the preponderance

of the evidence the amount of loss sustained by a victim as a result of a crime considered at sentencing is on the victim.” Fassbender asserts that the court did not place this burden on Abfall because it started out by accepting what Abfall asked for and then subtracted from that. This is not an accurate description of the record. The court went over the items listed by Abfall on her “restitution summary” not because it was accepting them all as a starting point, but as an organized method of discussing whether she had proved each of the items she requested. The court found she had proved that some of the items were expenses or losses she had incurred as result of the injuries and some she had not proved.

¶20 With respect to the lost wages in particular, Fassbender objected to the “process of starting at what [Abfall] requested and going backwards,” because it was Abfall’s burden to prove the items she was requesting. The court agreed it was her burden. However, the court explained, it found she *had* proved she was entitled to the lost wages she sought, except those related to the kidney stones, and that is why the court was subtracting. Because of that finding, the court also acted logically in subtracting from the lost wages Abfall requested for 2004 certain of the absent days that Fassbender objected to because the nature of the illness on those days was not clear. In effect, based on this objection, the court reconsidered and modified its finding on the lost wages Fassbender had proved for 2004.

¶21 Third, the restitution ordered by the court was supported by evidence that the injuries inflicted by Fassbender were a substantial factor in causing those expenses or losses. Abfall described the injuries she received, and the medical records from the emergency room visit on September 1, 2004 corroborated those injuries. Those, together with other medical records and billing records, provide a reasonable basis for deciding that Fassbender’s conduct was a substantial factor in causing the unpaid medical expenses of \$443.04. Abfall’s testimony regarding her

glasses, which the court was entitled to credit and evidently did, provides a reasonable basis for deciding that Fassbender's conduct caused that loss and that it would cost \$400 to replace them.

¶22 Abfall's testimony and her employer's letters were evidence of the days she missed work because of the injuries she received from Fassbender and the amount of lost wages resulting. The court accepted this evidence as credible, which it was entitled to do, and also considered whether the medical records supported it. The court determined that they did, except with respect to records relating to the kidney stones, which, the court found, were not sufficient to establish that this problem was caused by Fassbender's conduct. The court also determined a number of days in 2004 after September 9 that could not be tied to a doctor visit or recovering from the injuries. The court's determinations on all these points has a reasonable basis in the evidence.

¶23 Fourth, the circuit court did not err in failing to consider Fassbender's ability to pay. WISCONSIN STAT. § 973.20(13)(a)2-4 provides that the court "shall consider" the financial resources of the defendant, the present and future earning ability of the defendant, and the needs and earning ability of the defendant's dependents. However, subsec. (14)(b) provides that the burden of demonstrating these is on the defendant. The circuit court is not obligated by these sections to solicit information from the defendant about his or her ability to pay. *State v. Szarkowitz*, 157 Wis. 2d 740, 749, 460 N.W.2d 819 (Ct. App. 1990). Rather, the court's obligation is to consider evidence if it is introduced by the defendant and to give the defendant the opportunity to present such evidence. *Id.* Fassbender did not present any evidence of her income, resources, or needs of her dependents, and did not mention this to the court at all. We conclude the court did

not err in not considering her financial situation when she provided no evidence of it and gave no indication that she wanted to.

By the Court.—Order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)4.

